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THE POWER OF THE STATES TO INTERFERE WITH THE MAILS.

IN THE disputed zone between federal authority and the reserved rights of the states, interesting and often acute problems have frequently developed. The most important of these have probably been with regard to the national control of interstate commerce and the police power of the states, and several times Congress has passed legislation designed to leave certain subjects within the jurisdiction of the states or to make local regulations more effective. In Jefferson's administration, for example, Congress passed a law prohibiting the transportation of free negroes from one state into another where by local laws they were not permitted to reside; [1] the sale of oleomargarine has been made subject to local regulations; [2] Congress has forbidden the transportation of game killed in violation of state laws [3] and has twice enacted legislation to enable the states more effectively to regulate the sale of intoxicating liquors.[4] Such action has been necessary since Congressional silence has been interpreted by the courts as meaning that commerce between the states shall be free, just as, when Congress has acted affirmatively, state laws in conflict are thereby suspended; in both cases the supremacy of the federal authority is unquestioned. Never-

[1] Act of Feb. 28, 1803, 2 Stat. L. 295; Brig Wilson, 1 Brockenborough 423 (1820).

[2] 32 Stat. L. 193; U. S. *v.* Green, 137 Fed. 179 (1905).

[3] Criminal Code, § 242; Rupert *v.* U. S., 181 Fed. Rep. 87 (1910).

[4] Act of August 8, 1890, 26 Stat. L. 313 (Wilson Act); Act of March 1, 1913, 37 Stat. L. 699 (Webb-Kenyon Act).

theless, local jurisdictions have been permitted to exercise a slight measure of police control.[5]

It would seem evident, at first glance, that, inherently, the power of Congress over the postal system is more paramount than over interstate commerce, but there has been practically no judicial determination of the subject, and as there are only a few incidents in which a conflict of jurisdiction has taken place, conclusions as to the exclusiveness of the federal power must be drawn from principle rather than from precedent. Some aid, it is true, may be derived from the analogy of interstate commerce, but there is the possibly fundamental difference that postal facilities are established and conducted, while trade between the states is simply regulated, by Congress. From this arises the presumption that the mails are less subject to interference than interstate trade.

My attempt to ascertain the extent of state authority may seem to have only an academic value and to labour the obvious, but there are some points of present practical importance. The Circuit Court of Appeals for the Fourth Circuit, for example, has recently held that the state of West Virginia may constitutionally make it a crime for a resident of another state to use the mails to solicit orders for intoxicating liquors even when, in the writer's opinion at least, the shipment is protected by the commerce clause of the federal constitution and delivery to the consignee can not be prevented by the state. Again, local jurisdictions are attempting to stop the advertisement of intoxicating liquors, and the question arises: how far may their police regulations go without encroaching on the postal power of Congress?[6]

The first controversy as to the rights of the states was raised in 1812, when the General Assembly of the Presbyterian Church and the Synod of Pittsburg memorialized Congress to suspend the carrying and opening of the mails on Sunday, but, owing to the "peculiar crisis of the United States" then pending, the pe-

[5] See 2 WILLOUGHBY ON THE CONSTITUTION, ch. xliii, and cases there cited.

[6] West Va. *v.* Adams Express Co., 219 Fed. 794 (1915); State *v.* Delaye (Ala.), 68 South. 993 (1915).

titions were withdrawn and the House Committee on Post Offices and Post Roads did not consider the requests on their merits.[7] In practice the activities were lessened, offices at which the mail arrived on Sunday being kept open for one hour only, and that not during the time of public worship. So, the Senate Committee to which similar memorials were referred, deemed it inexpedient to make any change, particularly "considering the condition of the country, engaged in war, rendering frequent communication through the whole extent of it absolutely necessary." [8]

The practice to which objection was made had obtained since the adoption of the Constitution. By the postal act passed in 1810 [9] it was made a duty of postmasters "at all reasonable hours, on every day of the week, to deliver" mail to the proper persons, and since this provision was reenacted in 1825,[10] protests were still received from a number of the states in which rigorous Sunday observance laws had been passed. Upon the memorials which were presented in 1829 the Senate Committee acted unfavorably; the House Committee, however, acceded so far as to propose the discontinuance of delivery, but the maintenance of transportation.[11] The chief objection seemed to be to the keeping open of the post offices and not to the carrying of the mails, for which, it was realized, the greatest possible expedition was desirable. In 1830, counter memorials opposed "the interference of Congress, upon the ground that it would be legislating upon a religious subject and therefore unconstitutional," [12] but this argument is clearly untenable, since Sunday legislation has uniformly been upheld, not upon religious grounds, but as a valid exercise of the police power,[13] and Congress certainly has analogous authority so far as concerns the conduct of government business.

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[7] Miscellaneous State Papers, Vol. II (American State Papers, Vol. XXI), p. 194.

[8] American State Papers (Post Office), Vol. XV, p. 47.

[9] 2 Stat. L. 592. [10] 4 Stat. L. 102.

[11] American State Papers (Post Office), Vol. XV, p. 211. For the lengthy memorials presented, see *Ibid.*, pp. 229-241.

[12] *Ibid.*, p. 231.

[13] Freund, POLICE POWER, p. 168ff.

During the whole of this period, however, when certain localities and religious bodies desired observance of Sunday by the post office, the authority of Congress to make such regulations as it might see fit for the transportation of the mails was not seriously questioned, and the states did not attempt, under their police power, themselves to take affirmative action. One of the committee reports suggested, but did not argue, a contrary proposition when it asked: "If the arm of the government be necessary to compel respect and obey the laws of God, do not the state governments possess infinitely more power in this respect?" But this implication of authority in the states to interfere with the postal function is later denied when the committee says that in order to insure effective Sabbath observance it should be made a crime to receive, write, or read letters.[14] Congress, however, is the sole judge of the primary question. As a House Committee said in 1817: "The power 'to establish post offices and post roads' is by the Constitution of the United States exclusively vested in Congress; and the transportation and distribution of the mail, at such times and under such circumstances as the public interest may require, are necessarily incident to that power." [15]

It should be remembered, however, that the law provided for delivery "at all reasonable hours, on every day of the week," and so the question is different from that decided by the Supreme Court of the United States in Hennington *v.* Georgia, [16] where it was held that a state statute prohibiting the running of freight trains on Sunday was, in the absence of Congressional regulation on the subject, not invalid as interfering with interstate commerce. But even if Congress had not provided for the car-

[14] American State Papers (Post Office), Vol. XV, p. 230. See an interesting article on this subject in the *North American Review*, July, 1830.

[15] American State Papers (Post Office), Vol. XV, p. 358.

[16] 163 U. S. 299 (1896). "* * * legislative enactments of the states passed under their admitted police power, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not valid by force alone of the grant of power to Congress to regulate such commerce, if not obnoxious to some other constitutional provision or destructive of some right secured by fundamental law."

riage of the mails on Sunday, there could still be no stoppage under a state statute, since the subject is one for exclusive and uniform federal regulation; and if the freight trains in the Georgia case had carried mails, the decision would have been otherwise.

Similarly, the state laws which provide punishment for working on Sunday are inoperative as applied to postal employees (in discharge of their duty imposed by federal regulations), even though the local statute may make no express exception. The question has rarely come before the courts, but it has been held a work of necessity to shoe horses used by a stage company in transporting the mail.[17] The work done by postal employees would, therefore, be "necessary" within the exemption made by nearly all Sunday observance laws; but if this were not the case, the laws would not apply.

Closely allied to this question is that of how far the states may go in making police regulations, regard for which will result in a temporary delay of the mails. As early as 1817 it was held by a federal circuit court that a municipal corporation is competent to prevent the reckless driving of a mail carrier through crowded streets.[18] Of similar import was the advice given the Post Office Department in 1852 by Attorney General Crittenden, that municipal ordinances prohibiting railroad trains from running at a rate of more than six miles an hour within the town limits, the mails thereby being delayed, were valid regulations and not in conflict with the act of Congress.

"When such regulations," said the opinion, "are fairly and discreetly made with intent to preserve the peace, safety, and well-being of the inhabitants of the city, they may be said to

[17] Nelson *v.* State, 25 Tex. App. 599 (1888). In some states express exemptions are made for the transportation of the mail. Cf. State *v.* Norfolk & W. R. Co., 33 W. Va. 440, 10 S. E. 813 (1890). A typical Sunday observance statute is the following: "No person whatsoever shall work or do any bodily labor on the Lord's Day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's Day (works of necessity and charity always excepted)." Public General Laws of Maryland, Art. 27, § 384 (ed. of 1904).

[18] U. S. *v.* Hart, 1 Peters' C. C. 390 (1817).

flow from powers necessary and proper in themselves, which the act of Congress does not intend to take away or impugn." [19]

At later dates, the validity of similar regulations requiring trains to stop at particular points was passed upon by the United States Supreme Court and the exercise of local authority was, in several cases, declared inoperative, primarily upon the ground that it interfered with the freedom of trade between the states, and the commercial, rather than the postal, power was relied upon, as in federal incorporation, to furnish the basis of the Court's decisions. But the fact that, in many instances, the trains carried the mails under contracts which required expedition, was incidentally referred to as a further reason for declaring local regulations invalid.

Thus, when an Illinois statute required an interstate train to turn aside from the direct route for a stop at a station three and one half miles away, the Supreme Court held the requirement to be "an unconstitutional hindrance and obstruction of interstate commerce and of the passage of the mails of the United States. * * *

"It may well be, as held by the courts of Illinois, that the arrangements made by the company with the Post Office Department of the United States cannot have the effect of abrogating a reasonable police regulation of the state. But a statute of the state, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation." [20] And in a later case the court said:

"The fact that the company has contracts to transport the mails of the United States within a time which requires great speed for the trains carrying them, while not conclusive, may still be considered upon the general question of stopping such trains at certain stations within the boundaries of a state. The railroad has been recognized by Congress and is the recipient of large land grants, and the carrying of the mails is a most important

[19] 5 Opinions of the Attorneys General, 554 (1852).

[20] Illinois Central Railroad Company *v.* Illinois, 163 U. S. 142, 154 (1896). See same case below, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119 (1892).

function of such a road." [21] The test as laid down by the United States Supreme Court is, therefore, simply one of reasonableness and necessity; and the courts, not the legislatures, are to determine the question.

But there are many cases in which the problem is not so simple, and where the state regulations are so important that it is a question whether their violation should be permitted under the cloak of federal sanction. Particularly is this true where the detention of a postal employee is, superficially, forbidden under the federal statutes, and there arises the dilemma that either the governmental agent is immune from interference while in discharge of his duties and at all times for acts committed in the course of his employment, or that the national regulations must give way.

For example, from the beginning of Congressional activity under the postal power, there has constantly been a prohibition, under severe penalties, of any obstruction of the mail. The Federal District Court for Maryland considered a case where stage horses upon which an innkeeper had a lien were stopped in the public highway while driving a coach containing the mail. The court held that since the United States could not be sued, "the defendant could not justify the stopping of the mail on principles of common law, as they apply to individuals and to the government." But, further, the defendant was not justifiable under the act of Congress which introduced no exception. "Whether the acts which it prohibits to be done were lawful or unlawful before the operation of that law, or, independent of it, might or might not be justified, is not material. This law does not allow any jurisdiction of a *willful and voluntary* act of obstruction to the passage of the mail. If, therefore, courts or juries were to introduce exceptions not found in the law itself, by admitting justifications for the breach of the act, which justifications the act does not allow to be made, it would be an assumption of legislative power." [22]

And when a warrant in a civil suit was served on a mail car-

[21] Mississippi R. Commission *v.* Illinois C. R. Co., 203 U. S. 335, 345 (1906). See also Atlantic Coast Line R. Co. *v.* Wharton, 207 U. S. 328 (1907).

[22] U. S. *v.* Barney, 3 Hughes 545 (U. S. C. C., 1810).

rier and he was detained thereby, Chief Justice Taney (on circuit) held that the warrant was not justification to the traverser, a constable, yet the mere *serving* "would not render the party liable, to an indictment under this law. But if, by serving the warrant, he *detained* the carrier, he would then be liable." [23] Here also the immunity was simply as to civil proceedings.

But when a carrier, while discharging his duty, was arrested upon an indictment for murder, and it was argued that this was an obstruction of the mail within the federal statute, the Supreme Court refused to listen to the plea, and held that the law, "by its terms applies only to persons who 'knowingly and willfully' obstruct the passage of the mail or of its carrier; that is, to those who know that the acts performed will have that effect and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. All persons in the public service are exempt, as a matter of public policy, from arrest upon a civil process while thus engaged. Process of that kind can, therefore, furnish no justification for the arrest of a carrier of the mail. * * * The rule is different when the process is issued upon a charge of felony. No officer or employee of the United States is placed by his position, or by the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of a felony, in the forms prescribed by the Constitution and laws.

"The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers on such charges is far less than that which would arise from extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for Congress to exempt the employees of the United States from ar-

[23] U. S. *v.* Harvey, 8 Law Reporter 77 (U. S. C. C., 1845).

rest on criminal process from the state courts when the crimes charged against them are not merely *mala prohibita* but are *mala in se*. But whether such legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language." [24]

Thus, the Supreme Court of Maine decided that a mail carrier, while in the performance of his duties, is liable to arrest for an offense against the law of the state, even though it be not a felony but a violation of a liquor regulation, and the public employment of the carrier will not justify him in assaulting the officer who serves the warrant.[25] It was held, further, that preventing a horse from being taken from the stable for the purpose of carrying the mail was no offense under the federal law since the mail had to be *in transitu*.[26]

The attachment, knowingly, of a coach carrying the mail is void, being obstruction;[27] but levy on and sale of a ferryboat used to carry the mail do not constitute an obstruction.[28] In United States *v.* De Mott [29] it was held that the statute "is applicable to a person stopping a train carrying the United States mail, although he has obtained a judgment and writ of possession from a state court against the railroad company in respect to lands about to be crossed by such train." It is, moreover, not a sufficient plea to an indictment for obstructing the mails, that the defendant was required by state law to collect tolls in advance from all drivers of wagons. "It is not the right of the company to the tolls under the state law which is doubted," said the court, "but the right to stop the passage of the mails to enforce their collection which is denied." [30]

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[24] U. S. *v.* Kirby, 7 Wall. 482, 486 (1869); see also U. S. *v.* Clark, 23 Int. Rev. Rec. 306 (U. S. D. C., 1877).

[25] Penny *v.* Walker, 64 Me. 430 (1874).

[26] U. S. *v.* McCracken, 26 Fed. Cas. 1069 (1878).

[27] Harmon *v.* Moore, 59 Me. 428 (1871).

[28] Lathrop *v.* Middleton, 23 Cal. 257 (1863). In this case, however, the boat was at the time in an unfinished condition and had not been used on the ferry.

[29] 3 Fed. 478 (1880).

[30] United States *v.* Sears, 55 Fed. 268 (1893). In Turnpike Co. *v.*

But a different and more serious question, upon which these cases throw little or no light, is presented when a postal agent in the discharge of a duty imposed by federal law (neglect of duty being punishable), thereby performs an act which has been made criminal by the state.[31] There are, naturally, but few cases when this conflict arises, but it is entirely possible, perhaps the most favorable opportunity being when a postmaster distributes certain mail matter, the possession or dissemination of which the state has declared unlawful. This conflict was once presented very acutely.

In the Senatorial debate on Calhoun's bill to deal with incendiary abolition literature in the mails, the federal question of interference with the freedom of the press received the greatest attention,[32] and the equally important question of the validity of state legislation was only meagrely considered. Nearly all of the Southern states had extremely stringent laws, making the publication, circulation, and even the possession of objectionable literature punishable by severe penalties. Postal officials were not exempted; in Virginia they were specifically included.[33] Nevertheless, the objectionable dissemination continued, and Amos Kendall, Postmaster General, who had left the problem largely in the hands of local

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Newland, 15 N. C. 463 (1834), it was held that a mail coach was a "pleasure carriage" within the meaning of the local statute imposing tolls for the use of the road. The use of state facilities by persons employed in the federal civil service, said the court, "must be deemed intended to be on the terms prescribed to all persons, unless the law under which it is performed declared the contrary. We have found no act of Congress exempting persons or carriages engaged in the business of the post office from the payment of tolls for passing ferries, bridges or roads." Payment was therefore required.

[31] The seriousness of such a conflict was well expressed by Chief Justice Marshall in Cohens *v.* Virginia, 6 Wheat. 264 (1821): "To interfere with the penal laws of a state where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure which Congress cannot be disposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would then be taken deliberately and the intention would be clearly and unequivocally expressed."

[32] See article by author, "Federal Interference with the Freedom of the Press," 23 *Yale Law Journal* 559 (May, 1914).

[33] Hurd, LAW OF FREEDOM AND BONDAGE, Vol. II, pp. 9-10.

officers, was importuned from many sources to take decisive action. The citizens of Petersburg, Va., on August 8, 1835, petitioned him to "adopt such lawful regulations in his department as may be calculated to prevent" the dissemination of incendiary papers. Other resolutions were adopted at Richmond [34] and at Charleston where it was declared:

"That the post office establishment cannot consistently with the Constitution of the United States and the objects of such an institution, be converted into an instrument for the dissemination of incendiary publications, and that it is the duty of the federal government to provide that it shall not be so prostituted, which can easily be effected by merely making it unlawful to transport by the public mail, through the limits of any state, any seditious papers, forbidden by the laws of such state, to be introduced or circulated therein, and by adopting the necessary regulations to effect the object." The resolutions then went on to assert "the right of each state to provide by law against the introduction of a *moral pestilence,* calculated to endanger its existence, and to give authority to their [*sic*] courts adequate to the suppression of the evil." [35]

To the Petersburg resolutions, Kendall replied at some length, very conciliatorily, and plead that the discretion was not vested in him. "Having no official right to decide upon the character of papers passing through the mails," he said, "it is not within my power by any 'lawful regulation' to obviate the evil of which the citizens of Petersburg complain. If any necessity exists for a supervision over the productions of the press which are transmitted by mail, all will agree that it ought not to be vested in the head of the executive department. * * *

"For the present I perceive no means of relief except in the responsibilities voluntarily assumed by the postmasters through whose offices the seditious matter passes." [36]

In a letter to Gouverneur, the postmaster at New York, who

[34] The Richmond resolutions were less elaborate, simply requesting the postmaster general "to use all powers vested in him by law" to prevent the dissemination and delivery of the objectionable matter.

[35] NILES' REGISTER, Vol. XLVIII, p. 446.

[36] *Ibid.*, Vol. XLIX, p. 7.

had exercised his discretion in detaining certain publications, Kendall expressed the same views, but argued the constitutional problem at greater length. "As a measure of great public necessity," he said, "you and the other postmasters who have assumed the responsibility of stopping these inflammatory papers, will, I have no doubt, stand justified in that step before your country and all mankind." Perhaps also, he suggested, the abolitionists did not have their imagined clear legal right to the use of the mails for distributing insurrectionary papers. When the states became independent, he argued, "they acquired a right to prohibit the circulation of such papers within their territories; and their power over the subject of slavery and its incidents was in no degree diminished by the adoption of the Federal Constitution. * * *

"Now," he asked, "have these people a legal right to do by the mail carriers and postmasters of the United States acts which, if done by themselves or their agents, would lawfully subject them to the punishment due felons of the deepest dye? Are the officers of the United States compelled by the Constitution and laws to become the instruments and accomplices of those who design to baffle and make nugatory the constitutional laws of the states—to fill them with sedition, murder, insurrection—to overthrow those institutions which are recognized and guaranteed by the Constitution itself?

"And is it entirely certain that any existing law of the United States would protect mail carriers and postmasters against the penalties of the state laws, if they shall knowingly carry, distribute or hand out any of these forbidden papers? * * * It might be vain for them to plead that the post office law made it their clear duty to deliver all papers which came by mail. In reply to this argument, it might be alleged that the post office imposes penalties on postmasters for *'improperly'* detaining papers which come by the mail; and that the detention of the papers in question is not improper because their circulation is prohibited by valid state laws. Ascending to a higher principle, it might be plausibly alleged, that no law of the United States can protect from punishment any man, whether a public officer or citizen, in a commission of an act which the state,

acting within the undoubted sphere of her reserved rights, has declared to be a crime.

"Every citizen may use the mail for any lawful purpose. The abolitionists may have a legal right to its use for distributing their papers in New York, where it is lawful to distribute them, but it does not follow that they have a legal right to that privilege for such a purpose in Louisiana or Georgia, where it is unlawful." [37] Arguing in this manner, Kendall arrived at his conclusion that the postmasters should use their own judgment and act on their own responsibility.

The Postmaster General's letter has been so fully set forth because it presents, although it by no means solves, all the constitutional questions to which this situation gave rise. The disputed issues were destined never to come before the Supreme Court of the United States for a judicial consideration; they were, however, to be meagrely discussed on the floor of the Senate and twenty years later were to be passed upon by the Attorney General in an official opinion. And was the Virginia law, including postal officials, constitutional? Could they be punished for circulating the prohibited matter when to do so was required by federal law as a part of their official duty? Could a citizen of a state be punished for *receiving* mail of a certain character? Were the states competent to exclude from their borders publications calculated to stir up disaffection among the slave population?

Attorney General Caleb Cushing was called upon, in 1857, to pass upon some of these questions. The facts of the particular case presented to him were these: The postmaster of Yazoo City refused to deliver a newspaper for the "alleged cause that the same contained matter of which the tendency and object were to produce disaffection, disorder and rebellion among the colored population of the state of Mississippi; and that the delivery of the same by him would constitute a penitentiary crime according to the laws of that state." The removal of the postmaster for malfeasance in office was requested under the act of July 2, 1836, which provided punishment for postmasters who unlawfully detained the mail. On the other

[37] *Ibid.*, Vol. XLIX, p. 9.

hand, the laws of Mississippi made it a crime, punishable by not more than ten years' imprisonment, to bring into the state or circulate any printed matter "calculated to produce disaffection among the slave population." [38]

Cushing declared the postal power to be "conferred in very imperfect terms." The clause in the Constitution, he said, provides "for a means or incident without providing for the principal or end. Still, we may take it for granted here, that, by this phrase, the states designed to communicate the entire mail power to the United States." But, on the other hand, it is indisputable that "each state has, and must have, jurisdiction as regards the matter of insurrection or treason. To deny this would be to deny to the inhabitants of a state the power of self preservation, * * * a right inalienable and imprescriptible."

With this and the completeness of Congressional power over the mails as premises, Cushing said the question was as follows: "Has a citizen of one of the United States a plenary, indisputable right to employ the functions and the officers of the Union as the means of enabling him to produce insurrection in another of the United States? Can the officers of the Union lawfully lend its functions to the citizens of one of the states for the purpose of promoting insurrection in another state?

"It is obvious to say that, inasmuch as it is the constitutional obligation of the United States to protect each of the states against 'domestic violence' and to make provisions to 'suppress insurrection' " it cannot be the right or duty of the United States or any of its officers "to promote, or be the instrument of promoting, insurrection in any part of the United States." [39]

Reasoning thus, Cushing concludes "that a deputy postmaster or other citizen of the United States is not required by law to become, knowingly, the enforced agent or instrument of enemies of the public peace, to disseminate, in their behalf, within the limits of any one of the states of the Union, printed matter, the

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[38] 8 Opinions of the Attorneys General 489 (1857); 5 Stat. L. 80.

[39] Mr. Cushing argued (p. 494) that "it cannot be unlawful to detain that which it is unlawful to deliver." But the word "unlawful" in the congressional statute is not to be construed according to state regulations. Whether the detention of the mail is sanctioned must be determined by Congressional standards.

design and tendency of which are to promote insurrection in such state." But, at the outset, he said, any settlement of the particular case is involved in "a preliminary question of unsettled fact. The question is whether the contents of the particular newspaper had for their tendency and object to incite insurrection in the State of Mississippi." There are questions also as to the private rights of the addressee and the penal obligations of the deputy postmaster. These are for the courts. They only can "determine the question of the deputy postmaster's penal liability, whether on the side of the United States or of the state of Mississippi." The Attorney General thus comes to no absolutely definite conclusion, but the implication is very strong that there is no federal immunity from prosecution under the state law, and, conversely, that there can be no prosecution under federal law for neglect of duty or malfeasance.

To the same effect, but more clear cut, was the opinion of John Randolph Tucker sent to Governor Wise of Virginia on November 26, 1859.[40] The laws of Virginia provided that "if a postmaster or deputy postmaster know that any such book or writing [inciting the negroes to rebellion] has been received at his office in the mail, he shall give notice thereof to some justice, who shall inquire into the circumstances and have such book or writing burned in his presence; if it appears to him that the person to whom it is directed subscribed therefor, knowing its character, or agreed to receive it for circulation to aid the purposes of the abolitionists, the justice shall commit such person to jail. If any postmaster or deputy postmaster violate this section, he shall be fined not exceeding $200."

In his opinion, Tucker, as Attorney General of the state, held the law to be entirely constitutional. It does not, he said, "properly considered, conflict with federal authority in the establishment of post offices and post roads. This federal power to transmit and carry mail matter does not carry with it the power to publish or circulate. * * *

"With the transmission of the mail matter to the point of its reception the federal power ceases. At that point the power of

[40] 26 Cong. Rec., Part 9, Appendix, Part I, p. 4ff. (53d Cong. 2d Sess.)

the state becomes exclusive. Whether her citizens shall receive the mail matter is a question exclusively for her determination. * * *

"It is true that the postmaster is an officer of the federal government; but it is equally true that he is a citizen of the state. By taking a federal office he cannot avoid his duty as a citizen; and his obligation to perform the duties of his office cannot absolve him from obedience to the law of the Commonwealth. * * *

"I have no hesitation in saying that any law of Congress impairing directly or indirectly this reserved right of the state is unconstitutional, and that the penalty of the state law would be imposed upon a postmaster offending against it, though he should plead his duty to obey such unconstitutional act of Congress."

Tucker's memorandum was sent to Postmaster General Holt, who cited Cushing's opinion (which Tucker had not seen), and ruled against the supremacy of the federal law. "The people of Virginia," said Holt, "may not only forbid the introduction and dissemination of such documents within their borders, but if brought there in the mails they may, by appropriate legal proceeding, have them destroyed. They have the same right to extinguish firebrands thus impiously hurled into the midst of their houses and altars that a man has to pluck the burning fuse from a bombshell which is about to explode at his feet."

It would seem, however, that such reasoning, while careful and persuasive, is erroneous. At the time these opinions were rendered, the absolute supremacy of federal law, when constitutionally enacted, was not accepted without question. It is true that, prior to this, provision had been made for the removal, before trial, of a prosecution arising under the revenue laws of the United States, and also that federal judges should have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement "where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof." [41]

From the doctrine of federal supremacy it logically follows

[41] Act of March 2, 1833; 4 Stat. L. 632.

that it is not within the power of a state to punish acts done under authority of federal law, but at the time the question of incendiary publications was acute, the Supreme Court had not decided the line of cases upholding the right of removal to federal courts and the release of officers for acts done in pursuance of federal authority. These cases declared it to be

> "an incontrovertible principle that the government of the United States may, by means of physical force exercised through its agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof * * * shall be the supreme law of the land." [42]

And, on the basis of this principle, it must be concluded that the postal employees could not be punished for distributing the incendiary matter when it was their federal duty so to do. To be sure, as argued by Cushing and Tucker, the United States guarantees each state a republican form of government and protects it against domestic violence, but this does not mean that a law which is passed by Congress to apply uniformly to the whole country, and which may, on account of peculiar local conditions, aid insurrectionary movements in certain of the states, is thereby unconstitutional. The resort of the states is not to the courts, but to Congress for the repeal of the harmful measure. Furthermore, the guarantee does not obligate the United States to insure a state against the occurrence of any violence, but simply to protect it, when the violence is attempted. Since, therefore, the federal laws made criminal the detention of any mail matter, with only such exceptions as Congress might introduce, there was no

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[42] Ex Parte Seibold, 100 U. S. 371 (1879). See also Tennessee *v.* Davis, 100 U. S. 257 (1879) and 1 Willoughby on the Constitution 124.

way in which the states might enforce their laws against incendiary literature, unless they could exclude it absolutely from their borders.

As to this power, there are no judicial precedents, but the carriage of the mails being under federal auspices and Congress having a property right in them, the authority of the states to exclude, if it exists at all, is certainly more narrow than that in regard to interstate commerce. As to this, the states may exclude from their borders only such articles as are intrinsically unfit for commerce and unmerchantable. The Supreme Court enumerated, as examples, "rags or other substances infected with the germs of yellow fever, or the virus of small pox, or cattle, or meat or other provisions that are diseased or decayed." These articles "may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life." [43] Publications calculated to incite the slaves to rebellion would hardly fall within this classification. The conclusion, then, must be that in disseminating the incendiary literature, the postal agents acted properly and that the state laws were inoperative as applied to them. But if the states have a restricted power of exclusion, such as that defined in the Bowman case, it is, in effect, a nullity, since circumstances can hardly be imagined under which its exercise might take place without delaying the mails, or violating federal statutes which attach penalties for opening the mail and interfering with it while *in transitu*.

There remains the further question, whether a state is competent to forbid the receiving of certain mail matter by its citizens, and here also the interstate commerce analogy affords an answer. By a long line of decisions, principally in regard to intoxicating liquors, it has been established that a state may not interfere with a commodity until it has reached the consignee, who has a right to receive shipments from without the state.[44] If the state forbids possession, no matter how acquired, then the question of receiving becomes academic, since it would be impossible to separate the two acts. So also, if Congress has excluded a com-

[43] Bowman *v.* Chicago & Northwestern R. Co., 125 U. S. 465 (1888).

[44] See, *inter alia*, Leisy *v.* Hardin, 135 U. S. 100 (1890), and Rhodes *v.* Iowa, 170 U. S. 412 (1897).

modity from interstate commerce, then the consignee's right to receive this commodity has been taken away, and the state has plenary power.[45] The same reasoning applies to the receiving of mail matter: the state would be competent to punish only if Congress has forbidden the use of the mails, as is the case, for example, with lottery tickets and obscene literature. But in any event, a law directed against receiving certain mail matter could just as well forbid possession, and as the state has power in the latter case, the distinction is without importance except in so far as the possession is more difficult to detect than the receipt. Certain it is, however, that, as was attempted by the incendiary literature legislation, the state may not punish a man for taking from the mails what the federal government permits to be sent.

This conclusion is applicable to the validity of legislation forbidding the advertisement of intoxicating liquors. The state may not keep out, or prevent the receipt of, such advertisements or journals containing them, when sent through the mails or interstate commerce; it may forbid the sale of such journals if not in their "original packages," [46] and if it attempts to penalize the possession of such advertisements, there is no constitutional question so far as the mails are concerned.

The use of the mails, however, may constitute a crime against the state, but the Circuit Court of Appeals for the Fourth Circuit has gone much farther than previous decisions, and in a recent case declared: "It makes no difference that the United States mail was used for the solicitation [of orders for intoxicating liquors]. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by

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[45] This is the theory of the Webb-Kenyon Act. See articles by author, "The Power of the States over Commodities Excluded by Congress from Interstate Commerce," 24 *Yale Law Journal* 567 (May, 1915), and "State Legislation under the Webb-Kenyon Act," 28 *Harvard Law Review* 225 (January, 1915).

[46] See the reasoning in State *v.* Delaye, 68 South. 993 (Ala., 1915). Quære: If only one newspaper was sent, would it be an original package?

poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses." [47]

In Adams *v.* The People [48]—the case probably meant but not cited by the last clause of the quotation—there was an indictment for obtaining money under false pretenses, although the defendant was a resident of Ohio and had never been in New York. So also, in cases referred to by the Circuit Court of Appeals, the solicitation through the mails of orders for intoxicating liquors has been punished where the matter was mailed and received within the limits of the state and there was no interstate commerce involved.[49] But the Supreme Court decisions cited by the Circuit Court of Appeals simply hold that Congress may make the use of the mails a crime when in furtherance of a purpose to violate federal laws and are obviously not precedents for sustaining the West Virginia legislation.[50]

Now, the *sine qua non* of forbidding solicitation by means of the post office is that the sale of the intoxicating liquor is itself a crime; otherwise the state could have an unrestrained power to prescribe the purposes for which the mails might be used. The Circuit Court of Appeals evidently reasoned on this basis and considered as constitutional the section of the state law which provides that "in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent, or employee." The Court held that such a regulation was sanctioned by the Webb-Kenyon Act,[51] although admittedly invalid if not thus justified. This presents a question that is beyond the purview of the present paper, but it is obvious that if the sales could be made, then the solicitation could not be made a crime; and it may be added, parenthetically, that the Court probably erred in holding that the sales were forbidden.

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[47] West Virginia *v.* Adams Express Co., 219 Fed. 794, 799 (1915).

[48] 1 N. Y. 173 (1848).

[49] Hayner *v.* State, 83 Ohio St. 178 (1910). See also Zinn *v.* State, 83 Ark. 273, 114 S. W. 227 (1908).

[50] U. S. *v.* Thayer, 209 U. S. 39 (1908) and In re Palliser, 136 U. S. 257 (1890).

[51] 37 Stat. L. 699.

The case nearest in point—Rose Co. *v.* State [52]—is not cited by the Circuit Court's opinion. The defendant corporation in Tennessee mailed circulars advertising liquors to residents of Barton County, Ga. The Georgia law forbade solicitations where it was unlawful to sell, but the Supreme Court of Georgia held that shipments could be made from without the state under the protection of the commerce clause, and it could not, therefore, be a crime to use a federal agency in furtherance of a purpose that was sanctioned by the federal Constitution.

It may be said, then, that the use of the mails may be penalized only when in furtherance of a purpose that is unlawful; nor can it be argued—as was done with considerable force by the late James C. Carter against the exclusion of lottery tickets from the mails [53]—that the state may punish only when the purposes are *mala in se* and not when merely *mala prohibita*. If the state has the power, it may define "unlawful," but punishment cannot take place if the act sought to be effected by the use of the mails is permitted by state law, or if the inhibition is invalid, as is, in the writer's opinion, the case with the West Virginia legislation. Finally, it is difficult to see how the state may forbid anything but direct solicitation. A magazine or newspaper proprietor who publishes the advertisements does not use the mails for the purpose of consummating a crime, and the advertiser does not use the mails at all. The solicitation, therefore, must be direct.[54]

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[52] 133 Ga. 353, 65 S. E. 770, 36 L. R. A. (N. S.) 443 (1909), and note, which says that the case is one *primae impressionis*. It should be said that the decision in the Court of Appeals was *contra*. See 4 Ga. App. 588, 62 S. E. 117 (1908).

[53] In re Rapier, 143 U. S. 110 (1892).

[54] To make the record complete it should be added that the federal courts have exclusive jurisdiction of all offenses embraced by statute, committed in a post office owned by the United States or jurisdiction over which has been ceded by the state. Battle *v.* U. S., 209 U. S. 36 (1908). But the fact that a train is engaged exclusively in carrying the United States mail does not preclude the jurisdiction of a state court of a prosecution for the murder of an engineer, committed by derailing the train. Crossley *v.* California, 168 U. S. 640 (1898).